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EXHIBITS

Exhibit 1. Brief and Joint Appendix of Appellant-Petitioner, as filed in the lower court. Under Separate Cover
Exhibit 2. Brief as *amicus curiae*, Veterans of Foreign Wars, as filed in the lower court. Under Separate Cover
Exhibit 3. Brief as *amicus curiae*, American Legion, as filed in the lower court. Under Separate Cover

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 145

ORTON T. CAMPBELL,

Petitioner,

vs.

JOHN J. DEVINY, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Orton T. Campbell, most respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause on January 24, 1952.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 52) is reported at 194 F. (2d) 881. The opinion of the District Court (App. 41-45) is reported at 81 F. Supp. 657 (D. C. D. C. 1949). The Dis-

trict Court dismissed Petitioner's suit *solely* on the question of jurisdiction. The opinion was reached without automatic reference to the Court Commissioner of Veterans' Cases in violation of Local Civil Rule 29, *infra*. Petitioner's Brief and Appendix (joint) as filed in the lower court is attached herewith as *Exhibit 1*.

Notwithstanding Petitioner's complaint which distinctly and clearly set forth a genuine issue of material fact, i. e. reallocation and illegal restoration (App. 3-6), that all administrative decisions were in obvious error (App. 12), that all administrative procedures violated regulations (App. 6-10), that all administrative procedures violated the most elementary standards of fairness and reasonableness (App. 6-10); Petitioner's motion to strike and cross motion for summary judgment on question of jurisdiction (App. 33-37), Petitioner's opposing affidavit (App. 39), Petitioner's motion for production of documents (which would have upheld the points complained-of), Respondents' failure to answer complaint, and Respondents' affidavits (App. 16-32) consisting of general, unsupported conclusions (as compared with the factual statements in Petitioner's complaint), the District Court, in violation of Rule 56, Federal Rules of Civil Procedure, issued an opinion replete with the merits of the case as seen *only* by Respondents.

The presiding Judge of the District Court reached said opinion without permitting one scintilla of argument or evidence to be presented pro or con on the merits, the sole and only argument was on the question of jurisdiction as related to the reemployment rights of Federal employees and veteran's preference.

The Court of Appeals opinion affirmed the lower court's dismissal for lack of jurisdiction, notwithstanding the fact that the Court record (*Exhibit 1*) was most succinct and

clear in the above and that the Veterans of Foreign Wars and the American Legion both filed briefs as *amicus curiae,* urging reversal on the question of jurisdiction, ***Exhibits 2 and 3,*** herewith.

Jurisdiction

On April 22, 1952 the time for filing Petition for Writ of Certiorari was extended to and including June 21, 1952 (R. 56). The jurisdiction of the United States Supreme Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, and under 28 U. S. C. Sec. 1254(1).

Questions Presented

1. Whether the Court of Appeals properly affirmed that the District Court for the District of Columbia lacks jurisdiction in enforcing reemployment rights of Federal employees pursuant to Federal Selective Service statute(s) when said statute(s) is silent as to judicial relief?[1]

2. Whether the Court of Appeals properly affirmed that the District Court for the District of Columbia lacks jurisdiction under the provisions of Rule 81(b), Federal Rules of Civil Procedure, in enforcing the mandatory and unconditional reemployment rights when a Federal employee distinctly and clearly alleges a bona fide issue of material fact and distinctly and succinctly alleges that all administrative decisions are in obvious error in the complaint as filed?

3. Whether the Court of Appeals properly agreed with the opinion of the District Court and "upon that basis"

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[1] Hundreds of thousands of Federal employees are being called into military service during the present National emergency with reemployment rights pursuant to Section 9 of the Selective Service Act of 1948, 62 Stat. 614, which provisions are identical and enlarged to Sec. 8 of the Selective Service Act of 1940, 54 Stat. 890, involved in the instant case.

affirmed the judgment, when said opinion was issued in violation of the provisions of Rule 56, Federal Rules of Civil Procedure, and further was replete with opinions on the merits of the case, as seen *only* by Respondents, notwithstanding Petitioner's contradicting affidavits, motion for production of documents (which would have upheld the points complained-of), Respondent's failure to answer complaint, and wherein the sole question argued before the Court was that of jurisdiction, and the presiding Judge reached said decision without permitting one scintilla of evidence or argument to be presented *pro* or *con* on those merits?

4. Whether the Court of Appeals properly affirmed that an amount of $3,000 is a jurisdictional prerequisite in an original mandamus suit in the District Court for the District of Columbia for a Federal employee bringing suit under Rule 81(b), Federal Rules of Civil Procedure, although in this case neither party presented any evidence as to the sum involved, which sum was, in fact, more than said amount?

5. Whether the Court of Appeals properly affirmed that Sections 12 and 14 of the Veteran's Preference Act of 1944 has no application to the reemployment rights of a veteran Federal employee?

6. Whether the Court of Appeals properly affirmed that the District Court can ignore and violate its Local Civil Rule 29 in not automatically referring a veteran's case to the Court Commissioner of Veterans' Cases for a report when said case is fully within purview of Rule 29?

Statutes and Regulations Involved

Section 8, Selective Training and Service Act of 1940, as amended, 54 Stat. 890, 50 U.S.C. App. 308, provides in pertinent part:

> "(b) In the case of any such person who, in order to perform such training and service, has left or leaves

a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within [forty] (amended to 'ninety') days after he is relieved from such training and service—

(A) If such a position was in the employ of the United States Government, its Territories or possession, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay; * * *

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of sub-section (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

Sections 12 and 14, Veterans' Preference Act of 1944, 5 U.S.C. 861, 863, provides in pertinent part:

"12. *Reduction in Personnel; considerations affecting release.* In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided* that the length of time spent in active service of the armed forces of the United States of each employee shall be credited in computing total length of service: *Provided further* that preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose

efficiency ratings are below 'good' shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings."

"14. *Discharge, suspension, etc., only for cause; reason in writing; advance notice; personal appearance; findings and recommendations.* No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, *reduced in rank* or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing. * * *" (Emphasis supplied.)

Title 11, Section 315, D. C. Code, 1940 Edition, provides:

"The said District Court of the United States for the District of Columbia may, in its appropriate special terms, issue writs of quo warranto, mandamus, prohibition, scire facias, certiorari, injunction, prohibitory and mandatory, ne exeat, and all other writs known in common law and equity practice that may be necessary to the effective exercise of its jurisdiction."

Rule 81(b), Federal Rules of Civil Procedure, provides:

"The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

Rule 56, Federal Rules of Civil Procedure, provides in pertinent part:

"(c) *Motion and Proceedings Thereon.* * * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact. * * *

Rule 29, Local Civil Rules of the District Court for the District of Columbia, provides in pertinent part:

> "(a) *Reference to Commissioner.* The following cases when filed shall stand referred to the Commissioner of Veterans' Cases:
>
> "2. Action against an officer of the United States for mandatory or injunctive relief concerning insurance, compensation, retired emergency officers pay, or other benefits due veterans or their dependents."

Summary of Case (6½ years)

Petitioner was employed continuously in a permanent Federal Civil Service position in the Government Printing Office from October 16, 1935 until he enlisted in the military service of the United States on January 15, 1943, at which time he was placed on military furlough from the Planning Division and a position carrying the title of Estimator and Jacket Preparer.

Following his honorable discharge on January 23, 1946, Petitioner returned to duty in the Government Printing Office on April 15, 1946, within the statutory period.

For some time prior to Petitioner being placed on military furlough, he had been performing physical duties in a newly created section of Planning Division, which were not commensurate with job title, job description, or salary. Factually, all technical employees therein carried the title of Estimator and Jacket Preparer, the same as Petitioner, but which was not applicable to their physical duties.

After Petitioner left for military service (on Jan. 15, 1943) a reorganization took place in Planning Division on June 1, 1943, which resulted in the reallocation of all posi-

tions, including that of Petitioner, and proper job titles and salaries, directly commensurate with the physical duties all employees had been performing were awarded to all and *only* those employees present at the time of the reorganization and reallocation. The job titles of Estimator and Jacket Preparer were abolished.

However, due to the fact that all veterans, including Petitioner, were absent in military service, he and they were *entirely omitted from any consideration whatsoever in said reallocation.*

During Petitioner's terminal leave in Texas, he received a letter from Respondent Public Printer dated December 4, 1945, which stated that he would be reemployed in his old job title of Estimator (which had been abolished on June 1, 1943).

Immediately upon his return to civilian duty on April 15, 1946, Petitioner requested proper restoration to a position of like "seniority, status, and pay" in the relative employment framework considering the reallocation, pursuant to Civil Service Regulation published March 25, 1946, Federal Personnel Manual, which provides:

> "*Effect of Reallocation During Veteran's Absence*—If the position held formerly by a returning veteran has been reallocated to a higher level without substantial change in duties and responsibilities, the veteran is entitled to all benefits of the reallocation."

Instead, Petitioner was restored on paper records only to the *beginning and lowest* job title established in the reallocation, and employees having the same title arbitrarily given Petitioner were employed in an entirely different section. Notwithstanding his improper job title, Petitioner was again placed in his former section and again given his former duties but without the benefit of the reallocation.

When Petitioner returned from military service, his former position as reallocated, was occupied by an employee without military preference who had entered the position while Petitioner was absent. Factually, persons without military preference entering the section *years* after Petitioner left, and who had been doing a lower grade of work than Petitioner, but in the same office, were now working in more advanced positions, solely due to being present since the reallocation to reap the benefits, whereas Petitioner, being absent in military service, was entirely omitted from any consideration and upon his return was reduced in rank and status in the relative employment framework.

Petitioner repeatedly requested Respondent Public Printer to make a decision on his claim for proper reemployment, said requests being ignored until he appealed to the Civil Service Commission on March 10, 1947. The Commission notified the Public Printer of the appeal on March 11, 1947, whereupon the Public Printer, together with his agent, Director of Personnel, S. Preston Hipsley, quickly, deliberately, and with malice aforethought prepared a letter *predated* to February 28, 1947 but *mailed* on March 14, 1947 (which envelope was so postmarked), and which letter *pretended* that Petitioner's request for proper reemployment in the reallocation was a request for "promotion", and advised Petitioner that his request was "not worthy of serious consideration"; and a carbon copy of said letter was later presented to the Civil Service Commission, as planned, to make it *appear* that the Government Printing Office had taken action *before* the Commission had inquired of same.

In obvious error, Respondents Civil Service Commissioners, at all administrative levels, notified Petitioner by letters that his reemployment to the position of "Estimator" was proper, when in absolute truth and fact Petitioner was not and could not have been reemployed in a posi-

tion which had been abolished four and one half years before Respondents' final decision dated June 29, 1947.

Never at any time did the Government Printing Office nor the Civil Service Commission rule on the question of reallocation in any documents or proceedings whatsoever.

Having exhausted all administrative recourse, Petitioner then filed suit in the District Court for the District of Columbia on February 19, 1948, pursuant to provisions of Rule 81(b), Federal Rules of Civil Procedure; Selective Training and Service Act of 1940, as amended, 54 Stat. 885; Veterans' Preference Act of 1944, 58 Stat. 390, and in an amended complaint (App. 1-13) distinctly and clearly set forth, among other things, both the bona fide issue of material fact of reallocation and that all administrative decisions were in obvious error.

As related on page 2 of this petition, the District Court for the District of Columbia granted Respondents motion for summary judgment on the question of jurisdiction in most manifest breaches of law and judicial procedures. (See entire record, *Exhibit 1.*)

On January 19, 1949 Petitioner filed an appeal in the Court of Appeals. The Veterans of Foreign Wars filed a brief as *amicus curiae* urging reversal, *Exhibit 2.* The American Legion filed a brief as *amicus curiae* urging reversal, *Exhibit 3.* The case was calendared for oral argument on June 9, 1949.

After date of oral argument was established and all parties notified, Respondent Public Printer, in an obviously premeditated action,[2] to influence the processes of justice by

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[2] The late Hon. T. Alan Goldsborough, Trial Judge in the District Court session on May 18, 1951, commented on Respondent's bad faith as follows:

"But what did you do when he had an appeal in the Court of Appeals to have him put back in office? You discharged him just a few days

prejudicing Petitioner before the Court of Appeals in the instant case, dismissed[3] Petitioner from his civil service position on June 3, 1949, and all Respondents on June 6, 1949, moved the Court of Appeals to dismiss the case for mootness because of said dismissal. On June 10, 1949, the Court of Appeals ordered further proceedings indefinitely stayed (R. 50).

Subsequently, Petitioner's dismissal was set aside by order of the District Court for the District of Columbia on May 28, 1951. (See Findings of Fact and Conclusions of Law at R. 232 in companion petition for certiorari.) Petitioner immediately moved the Appellate Court to restore this cause to the calendar, and an order to that effect issued on June 10, 1951 (R. 51); oral argument being heard on October 12, 1951; and on January 24, 1952, the Court of Appeals issued a decision (R. 52), 194 F. 2(d) 881, wherein the opinion of the District Court (App. 41) granting Re-

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before his appeal could be heard, so as to stop the appeal. That is bad stuff, you know."

The report of the Commissioner of Veterans' Cases for the District Court, filed November 24, 1950, stated:

"The events preceding plaintiff's (Petitioner's) discharge lead me to the conclusion that he was discharged because the Public Printer would not stand for any employee claim, even statutory, no matter how just or inconsequential. When the plaintiff (Petitioner) pursued his remedy for relief into the Federal Court, the rage of the Public Printer apparently started a course of action that included his placing plaintiff (Petitioner) at a desk with no duties for ten months at the expense of the taxpayers. Then when charges were preferred against the plaintiff (Petitioner), there was revealed a 'tempest in a teapot', based on charges, many over two years old, and the rest about one year old each. I cannot see how any fair-minded executive could arrive at any other conclusion from the related facts herein than that the then Public Printer or his successor was attempting to remove from the classified service an employee in contravention to the provisions of the Veterans' Preference Act."

[3] Petitioner has two petitions for writ of certiorari presently before the Supreme Court, the instant case, and the same Respondents on the question of dismissal pursuant to the Veterans' Preference Act of 1944.

spondent's motion for summary judgment on the question of jurisdiction was *affirmed*.

Specification of Errors

The Court of Appeals erred:

1. In affirming that the District Court for the District of Columbia lacks jurisdiction in enforcing the mandatory and unconditional reemployment rights of Federal employees, pursuant to Section 8 of the Selective Training and Service Act of 1940.[4]

2. In affirming that the District Court lacks jurisdiction under the provisions of Rule 81(b), Federal Rules of Civil Procedure, in enforcing the mandatory and unconditional reemployment rights when a Federal employee distinctly alleges a bona fide issue of material fact and clearly alleges that all administrative decisions are in obvious error in the complaint as filed.

3. In agreeing with the opinion of the District Court in violation of the provisions of Rule 56, Federal Rules of Civil Procedure, when said opinion was replete with the merits of the case, as seen only by Respondents, notwithstanding Petitioner's contradictory affidavit, motion for production of documents (which would have upheld the points complained-of), Respondent's failure to answer complaint, and wherein the sole question argued before the court was that of jurisdiction, and the presiding Judge reached said opinion without permitting one scintilla of evidence or argument to be presented *pro* or *con* on the merits reflected throughout the lower court's opinion.

4. In affirming that an amount of $3,000 is a jurisdictional prerequisite in an original mandamus suit in the District Court for the District of Columbia for a Federal employee

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[4] See footnote 1.

bringing suit under Rule 81(b), Federal Rules of Civil Procedure, although in this case neither party presented any evidence as to the sum involved, which sum was, in fact, more than said amount.

5. In affirming that Sections 12 and 14 of the Veterans' Preference Act has no application to the reemployment rights of veteran Federal employees.

6. In affirming that the District Court can ignore and violate its Local Civil Rule 29 in not automatically referring a veteran's case to the Commissioner of Veterans' Cases for the District Court when said case was fully within purview of the Rule.

Reasons for Granting the Writ

1. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED A QUESTION OF GENERAL IMPORTANCE RELATING TO THE APPLICATION OF TWO STATUTES OF THE UNITED STATES, WHICH QUESTION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This is a petition for writ of certiorari to clarify the jurisdiction of the "Court of Last Resort"[5] for veteran

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[5] The Justice Department is obviously confused as evidenced by the following quotation from their brief filed in the United States Court of Appeals in the present case:

"It is noted that the United States Supreme Court denied certiorari in *Insular Police Commission* v. *Lopez*, 160 F. (2d) 673 (1947), cert. den. 331 U.S. 855. • • • If the right to judicial enforcement of reemployment privileges were as clearly established as appellant (Petitioner) claims, it seems that the Supreme Court would have granted certiorari in that case, and the fact that the United States District Courts (outside the District of Columbia) ordinarily lack mandamus powers, and cognizance of suits under $3,000 in amount, would not necessarily have been fatal. In any event, if the latter two jurisdictional deficiencies (mandamus and $3,000 limitation) were deemed fatal to the action, and the sole basis for the Supreme Court's affirmance (in effect) of the lower court decision, it would seem, nevertheless, that the (Sup.) Court would have granted certiorari, since in a matter of novel impression in a question of such import, the court, undoubtedly, would have felt impelled to specify

Federal employees—the District Court for the District of Columbia—for judicial enforcement of the mandatory and unconditional reemployment rights (See *Hilton* v. *Sullivan*, 768 Sup. Ct. 1020) pursuant to Federal Selective Service Statutes.[6] Said reemployment rights presently stand denied at will by executive whim, caprice, and fiat because the only court available to Federal employees, the District Court for the District of Columbia, notwithstanding Rule 81(b), now stands firmly closed for lack of jurisdiction.

That the question here presented is of general importance and concern to every Federal employee subject to call into military service and subsequent reemployment is most obvious as reflected in the brief as *amicus curiae* of the Veterans of Foreign Wars, attached herewith as *Exhibit 2*, filed in the court below, which stated on page 10:

> "The last word, as always, rests with the judiciary, and we and millions of veterans greatly concerned await your decision believing that the decision and order of the Court below granting Appellee's (Respondent's) motion for summary judgment and denying that of Appellant (Petitioner) should be reversed."

The brief as *amicus curiae* of the American Legion, as authorized by its National Executive Committee, attached herewith as *Exhibit 3*, filed in the court below, stated on page 3:

> "The jurisdictional question involved in this case is of utmost importance to and affects the welfare and statu-

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the limited nature of its affirmance of the decision below, not only to afford the claimant the opportunity of refiling his suit in the District of Columbia where mandamus would lie, but to clarify generally the extent and scope of the remedy provided in the statute. • • •"

[6] Hundreds of thousands of Federal employees are presently being called into military service during the present National emergency, pursuant to Section 9 of the Selective Service Act of 1948, 62 Stat. 614, which provisions are identical and enlarged to the Act of 1940.

> tory rights of a large number of veterans of World War II employed by the Federal Government who left their employment to serve their Country in the Armed Forces, who will be denied the opportunity of judicial enforcement of laws enacted for their benefit by the National Congress if the decision of the lower court is affirmed."

It seems abundantly clear that the Congress when it passed this legislation did not contemplate that the courts would refuse judicial enforcement if administrative authorities failed to carry out its mandate. The view taken by the court below defeats the manifest purpose and design of the statute.

The United States Supreme Court in *Hilton* v. *Sullivan*, 768 Sup. Ct. 1020, said:

> "We have examined the legislative history of the Selective Training and Service Act of 1940 and find nothing whatever which faintly suggests that Congress intended its language to be less mandatory than implied by the words it used. • • •
>
> "We have previously pointed out that Congress in Sec. 8(b)(A) imposed a mandatory and unconditional reemployment obligation upon the Federal Government; in other words, the section guaranteed that a returning veteran would get back his job with the Government."

There can be no doubt but that the intent and command of Congress was to put the returning veteran in exactly the same position he would have been had he not gone to war. The court below sanctioned the District Court's opinion which erroneously stated that the controversy involved the "internal administration" involving "judgment and discretion". The complaint and entire record herewith is succinct and clear as to the administrative caprice exercised in the instant case wherein Petitioner was en-

tirely omitted from consideration in the reallocation of positions in his employing agency.

In *Kephart* v. *U. S.*, 74 Fed. Supp. 578, the Court of Claims in a nearly identical case concerning the rights of a returning veteran said:

> "(1) * * * during his first tour of active military duty from October 1940 to October 1941, the duties formerly performed by him and other P-5 examiners were divided and the more complex cases were assigned to examiners holding positions reallocated to grade P-6 classification. This, of course, left the less complex cases to be handled by the P-5 examiners; thus to restore plaintiff to a P-5 position handling cases of less complexity than those he formerly handled would not constitute a restoration to a position of like seniority, status, and pay. It might be said that to restore him as a P-6 examiner would in a way be restoring him to a higher position than that which he left, * * * but the division of work and the classification of the new positions for some of the work was a natural evolution of the Interstate Commerce Commission and if plaintiff is not permitted to be restored to a position in which he would be engaged on cases of the same relative complexity as when he left, he is being placed at a disadvantage * * *, which would be a demotion in every way except pay. The Acts of Congress were clearly designed to prevent any disadvantage from accruing to a soldier because of his military service. Cf. *Fishgold v. Sullivan Drydock and Repair Corp.*, 66 Sup. Ct. 1105. * * *
>
> "It is true that the Interstate Commerce Commission in their administrative discretion considered plaintiff with the other nine P-5 examiners for 'promotions' to the P-6 position and they did not select plaintiff. * * * The law was clearly intended to preclude restoration to work of a lower classification.
>
> "(2) It is held therefore that restoration of plaintiff to a position of like seniority, status, and pay * * * required his restoration at the grade of P-6 * * *. By

such restoration the plaintiff can be given the rights intended by the various acts designed for the benefit of those who were required to enter the military service."

As noted in the instant case, Petitioner was entirely omitted from any consideration and was restored at the beginning and lowest grade established, and his former position, as reallocated, was held by an employee without military preference who had entered Petitioner's position during his absence in military service.

The second Federal Statute, Sections 12 and 14 of the Veterans' Preference Act of 1944, automatically becomes involved in the reemployment rights of a Federal employee. The court below sanctioned the District Court's decision to the contrary. In the instant case, an employee without military preference held Petitioner's position which necessitated a reduction in personnel action under Section 12, if necessary, to properly restore Petitioner. If a veteran is restored to a lower position than formerly held, the veteran is demoted, *Kephart* v. *U. S.*, supra, and the provisions of Section 14 prohibit such action.

Just as the courts give a wide and liberal construction to the penal provisions of Section 11 [7] of the Selective Service Act of 1940 regarding draft evasion, etc., in order to effect its purpose, so Petitioner contends that the court should not

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[7] Section 12, Selective Service Act of 1948, 62 Stat. 620, is identical and states:

"• • • any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, • • • or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, or regulations or directions made pursuant to this title, • • • shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment • • • or a fine • • • or by both • • •"

give a narrow construction to the remedial provisions of Section 8.

2. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT ON THE SAME GENERAL QUESTION OF JURISDICTION.

The action of the court below relies entirely on the silence within Section 8 (b)(A) of the Selective Service Act as to judicial enforcement of the reemployment rights of Federal employees.

The courts will enforce acts granting rights to Federal veteran employees although the statutes creating such rights are silent as to judicial review.

In the case of *Dismuke* v. *U. S.*, 297 U. S. 167, 80 L. Ed. 561, 56 Sup. Ct. 400, the Court stated:

> "But in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer."

The Court further held:

> "The power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates and to which the claimant upon facts found or admitted by the administrative officer is entitled."

There is no "plain command" in this legislation which would authorize Respondents to deny the right which the statute creates.

The court in the case of *Fischer* v. *Haeberle,* 80 Fed. Sup. 652 said:

> "• • • the Supreme Court has held that the silence of Congress as to the judicial review of orders of an administrative body is not necessarily to be constructed

as a denial of the power of Federal Courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them. The authority for judicial review may be found in the existence of courts and the intent of Congress as deduced from statutes and precedents."

and cited *Stark* v. *Wickard,* 1944, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733; *Miguel* v. *McCarl, Comptroller General, et al.,* 1934, 201 U. S. 442, 54 S. Ct. 465, 78 L. Ed. 901; and *Dismuke* v. *U. S., supra,* in support thereof.

3. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA HAS SO FAR SANCTIONED SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

The court below sanctioned a decision by the District Court replete with the merits of the case, as seen only by Respondents, in passing on summary judgment without permitting one scintilla of evidence or argument *pro* or *con* on said merits. (See entire record herewith.) The complaint (App. 1-13) and opposing affidavit (App. 39) clearly alleged a bona fide issue of material fact and that all administrative decisions were in obvious error.

The complaint avers facts which bring this case squarely within the requirements of the Supreme Court as in the case of *Dismuke* v. *U. S., supra,* as to judicial review of administrative decisions as follows:

"If he is authorized to determine questions of fact, his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence; see *Silberschein v. U. S.,* 45 S. Ct. 69; *U. S. v. Williams,* 49 S. Ct. 97; *Meadows v. U. S.,* 50 S. Ct. 279; *Degge v. Hitchcock,* 33 S. Ct. 639; or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceedings which Congress has authorized." (Citing cases.)

The actions of the court below ignore the fact that the allegations in the complaint must, for the purpose of determining the court's jurisdiction, be accepted as true. *Dollar* v. *Land*, 154 F. (2d) 307, affirmed, 330 U. S. 731, and contradicted a previous holding by the Court of Appeals for the District of Columbia in *Hunter* v. *Mitchell*, 180 F. (2d) 764 which stated:

> "The lower court granted appellee's motion for a summary judgment and we hold that it erred in so doing. There is a genuine issue as to a material fact involved in the case, to wit, whether or not the appellant's down grading was the result of a reduction in force or a general reorganization plan in the Design Branch at the Philadelphia Navy Yard. • • • This principle was reiterated in *Toebelman v. Missouri-Kansas Pipe Line Co.*, 130 F. (2d) 1016, in which we said, 130 F. (2d) at page 1018: 'Upon a motion for summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. • • • All doubts as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment. *Weisser v. Mursam Show Corp.*, 2 Cir., 1942, 127 F. (2d) 344, 145 A.L.R. 467'. • • •
>
> "And again in *Frederick Hart & Co., Inc. v. Recordgraph Corp.*, 3, Cir. 1948, 169 F. (2d) 580, 581, it was said that: 'It is well settled that on motions to dismiss and for summary judgment, affidavits filed in their support may be considered for the purpose of *ascertaining whether an issue of fact is presented, but they cannot be used as a basis for deciding the fact issue'.*"

It is obvious from the record herewith that the present case manifestly violates the accepted and usual course of judicial procedure, particularly as regards to Rule 56, Federal Rules of Civil Procedure.

The lower court further sanctioned the District Court's violation of Rule 81(b), Federal Rules of Civil Procedure because it has long been well settled that the United States District Court for the District of Columbia has original mandamus jurisdiction to compel the performance of a mandatory statutory duty not involving discretion. Title 11, Sections 301 and 315, D.C. Code 1940; *U. S. ex. rel. Kansas City Southern Railway Co.* v. *Interstate Commerce Commission*, 18 F. Supp. 94, affirmed 68 App. D.C. 396, 98 F. (2d) 268, Cert. denied 59 S. Ct. 86, 305 U. S. 625, 83 L. Ed. 400. *Haskins Bros. & Co.* v. *Morganthau*, 66 App. D.C. 178, 85 F. 677, Cert. denied 57 S. Ct. 118, 299 U. S. 588, 81 L. Ed. 433. *Ballou* v. *Kemp*, 68 App. D.C. 7, 92 F. (2d) 556.

The reemployment rights of a veteran Federal employee are mandatory and do not involve discretion. See *Hilton* v. *Sullivan*, 334 U. S. 322.

The lower court also sanctioned the District Court's violation of Local Civil Rule 29 in not automatically referring the case to the Court Commissioner of Veterans' Cases for report. Petitioner was fatally prejudiced, and such failure to refer obviously contributed to the District Court's issuing an opinion manifestly in error factually and legally which breached all concept of judicial etiquette, fairness, and procedure as related, *supra*, and as the entire record upholds.

Conclusion

Wherefore, Petitioner earnestly prays that a writ of certiorari be granted by the Supreme Court of the United States directed to the United States Court of Appeals for the District of Columbia Circuit wherein the decision of the lower court on the six questions presented herewith may be reversed in order that these matters of vast concern to

the great array of veteran Federal employees will be fully clarified in direct relation to the plain, unambiguous language, intent and purpose of the Congress as expressed by pertinent Federal statutes.

Most respectfully submitted,

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Boise, Idaho,
pro se.

Dated June 20th, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 145

ORTON T. CAMPBELL, *Petitioner*

v.

JOHN J. DEVINY, PUBLIC PRINTER, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Columbia (R. 41-45) is reported at 81 F. Supp. 657. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 52-53) is reported at 194 F. 2d 881.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1952 (R. 54). On April 22, 1952, the Chief Justice extended the time within

which to file a petition for certiorari to and including June 21, 1952 (R. 56). The petition for certiorari was filed on June 20, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts have jurisdiction over a proceeding in the nature of mandamus to compel petitioner's reemployment in the Government Printing Office at a higher grade where (a) the administrative action sought to be reviewed was discretionary in nature and involved the exercise of judgment, (b) where the procedural rights of the plaintiff were fully preserved, and (c) the only substantial charge was that the administrative action was merely erroneous on the merits.

STATUTE AND INSTRUCTION INVOLVED

1. Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, as amended by the Act of December 8, 1944, 58 Stat. 798, 50 U.S.C. App. 308, provides in pertinent part:

* * * * * *

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is

relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to particapte in insurance or other

benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so ap-

plying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against the person so applying for such benefits.

* * * * * *

2. The Federal Personnel Manual R6-16 provided:

> Effect of reallocation during veteran's absence.—If the position held formerly by a returning veteran has been reallocated to a higher level without substantial change in duties and responsibilities, the veteran is entitled to all benefits of the reallocation.

STATEMENT

In October, 1935, petitioner entered the employ of the Government Printing Office as an apprentice (R. 40). After having served in that capacity for five years at $15 a week (R. 18; 40) and as a journeyman for seventeen months (R. 18, 40), he was promoted on March 16, 1942, from Compositor at $1.26 an hour to the position of Estimator in the Planning Division at $3000 per year, comparable to the grade of CAF-7—fifth step (R. 18). Ten months later, on January 15, 1943, petitioner was

given a military furlough from which he returned on April 15, 1946 (R. 2).

While petitioner was serving in the Army a reorganization took place in the Planning Division to which petitioner had been assigned. It was split into four separate divisions (R. 22) with a resulting reallocation of positions. When petitioner returned from the Army he was restored to duty as an Estimator—Jacket Preparer, at a salary of $3640 per annum (Grade CAF-7—seventh step), which took into account the in-grade promotions he would have received had he not been absent.

Petitioner claimed, however, that as the result of the reorganization of the Planning Division his former job as Estimator (CAF-7) had been reallocated as Principal Technical Assistant (CAF-11) without substantial change in duties and responsibilities (R. 42), and that pursuant to Section 8 of Selective Service Act of 1940 (*supra*, pp. 2-5) he was entitled to be reemployed as a Principal Technical Assistant. The Government Printing Office rejected this claim on the ground that the job of Principal Technical Assistant was in no way comparable to the position petitioner had held prior to his entry into military service and that petitioner lacked the necessary qualifications and experience for this job which was essentially of a supervisory nature (R. 42; 21-25).

On March 10, 1947, petitioner appealed to the Veteran's Service Section of the Civil Service Commission. After a careful investigation and

analysis had been made of the positions held and claimed by petitioner, the appeal was denied on June 6, 1947, on the ground that petitioner's job had not been reallocated to a higher level. (R. 25; 29-30, cf. R. 44.) A further appeal filed by petitioner was heard by the Board of Appeals and Review which, after oral argument, decided that petitioner's claim was not justified and that the Government Printing Office had not violated the Selective Service Act of 1940. The findings of the Board were approved by the Civil Service Commission. (R. 25; 30-31.) Petitioner thereupon applied for, and was granted, a personal hearing before the three Civil Service Commissioners. The latter found unanimously that there had been no violation of the Selective Service Act of 1940. Petitioner was notified of this decision on January 29, 1948. (R. 25, 31.)

While the Government Printing Office rejected petitioner's claim that the job he had held at the time of his entry into military service was the equivalent of the new position of Principal Technical Assistant (CAF-11), it gave him a number of promotions which all but gave him the desired rating. On August 11, 1946, *i.e.*, about four months after his return to the Government Printing Office, he was promoted to Senior Technical Assistant (Grade CAF-8—fifth step) at a salary of $4,275;[1] a year later he received an in-grade pro-

[1] On July 1, 1946 he had received the benefit of the 14% increase in compensation provided for by the Act of May 24, 1946, 60 Stat. 216, 5 U.S.C. 672b.

motion to CAF-8—sixth step, at a salary of $4,400; and on January 25, 1948, he was promoted to the special position of Planner, at a salary of $4,900 (R. 53; 18-19). This last advancement brought him within $2 of the annual rate of compensation of a CAF-11.[2]

Petitioner filed his original complaint on February 19, 1948 (Pet. 10), a few weeks after he had been advised of the adverse decision of the Civil Service Commissioners and after he had been given the position of Planner.

The amended complaint filed on July 1, 1948, naming as defendants John J. Deviny, the Public Printer, and the three Civil Service Commissioners (R. 1-13), alleges in effect that the respondent Deviny acted unreasonably, arbitrarily, capriciously and contrary to law by refusing to reallocate his position to the grade of CAF-11 (R. 2-4), and that the Civil Service Commissioners "arbitrarily, capriciously and contrary to law . . . failed and refused to define Plaintiff's restoration rights in such manner as to give full effect to Section 8 of the Selective Training and Service Act." (R. 7).

The request for relief prays in substance that the respondents be required to grant petitioner all the rights to which he is entitled under the Selective Service Act of 1940.

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[2] In January, 1948, the compensation for the grade of CAF-11 was $4,902. Acts of March 4, 1923, 42 Stat. 1488, 1496, June 30, 1945, 59 Stat. 295, 300, 301, May 24, 1946, 60 Stat. 216, 5 U.S.C. 673, 672a, 672b.

The District Court granted respondents' motion for summary judgment, holding (R. 41-45) that the complaint constituted an unconsented suit against the United States, and that it could not be maintained as a proceeding in the nature of mandamus, since the administrative action sought to be reviewed was not of a ministerial nature but required the exercise of judgment and discretion, and, in addition, involved the complex field of personnel management with which the courts are reluctant to interfere. Moreover, the court found that respondents had given scrupulous and sympathetic consideration to petitioner's claim and that extraordinary measures had been taken to protect his rights. The Court of Appeals affirmed *per curiam* on the authority of the opinion of the District Court.[3]

ARGUMENT

1. Petitioner seeks to enforce the reemployment rights[4] claimed by him in an action in the nature

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[3] On June 3, 1949, petitioner was separated for cause from the Government Printing Office. This discharge is the subject of *Campbell* v. *Devine et al.*, No. 146, October Term 1952. It is submitted that the instant case is moot unless this Court holds that the discharge was improper (cf. R. 50).

[4] Pursuant to Section 8(b)(A), (c) (*supra*, pp. 2-4), the discharged veteran is to be restored to the position he left or to one of like seniority, status, and pay. If his position has been reallocated to a higher level without a substantial change in duties and responsibilities, the veteran is to be reinstated in that higher grade. Federal Personnel Manual R6-16, *supra*, p. 5.

of mandamus. The courts below properly held that this case does not come within the narrow confines of the mandamus jurisdiction, a remedy of a limited scope, *Wilbur* v. *United States,* 281 U.S. 206, 218.

a. Mandamus, while the appropriate vehicle to compel the performance of a ministerial duty, is not available to control official action which involves the exercise of discretion or judgment. *Adams* v. *Nagle,* 303 U.S. 532, 542; *Wilbur* v. *United States,* 281 U.S. 206, 218; *Knight* v. *Lane,* 228 U.S. 6, 13; *Ness* v. *Fisher,* 223 U.S. 682, 691-692; *Decatur* v. *Paulding,* 14 Pet. 497, 515; cf. *Marbury* v. *Madison,* 1 Cranch 137, 165-167. Both courts below correctly applied this rule, finding that the administrative action which petitioner is here attacking involves the exercise of discretion and judgment (R. 43, 53).

It is clear that these findings are correct. Concededly the veteran's reemployment rights are absolute and mandatory (*Hilton* v. *Sullivan,* 334 U.S. 323, 329). But determination of the grade in which the returned veteran has to be reemployed in case of a reallocation of position is by no means a mechanical, automatic task. It requires a comparison of the duties the employee performed prior to his entry into military service with the position to which he claims to be entitled and the determination whether the latter involves substantially the same duties and responsibilities. The evaluation of such questions of personnel management re-

quires specialized knowledge and experience.[5] Moreover, it covers an area in which the courts are especially hesitant to substitute their judgments for that of the defendant official, especially in a case like this where there has been substantial compliance with petitioner's request to be reemployed at the grade of CAF-11. *Keim* v. *United States,* 177 U.S. 290; *Eberlein* v. *United States,* 257 U.S. 82; *United States* v. *Mitchell,* 89 F. 2d 805 (C.A.D.C.).

b. Nor should the administrative determination be reviewed on the ground that it was arbitrary,

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[5] The statutory prerequisites for the position of CAF-11 are:

> Grade eleven, in this service, which may be referred to as the assistant chief administrative grade, shall include all classes of positions the duties of which are to perform the most difficult and responsible office work along specialized and technical lines, requiring extended training and experience, the exercise of independent judgment, and the assumption of responsibility for results, or to supervise the general business operations of an executive department, or to supervise a large and important office organization engaged in work involving extended training and considerable experience on the part of the employees. [Classification Act of 1923, Sec. 13, 42 Stat. 1488, 1496, 5 U.S.C. 673.]

This position obviously envisages a mature craftsman whose judgment and experience are based on many years of practical work in his field. A person 2½ years out of his apprenticeship would not appear to measure up to these exacting qualifications. And petitioner's own affidavit stating that he supervised the work of two employees (R. 39) indicates that he did not "supervise a large and important office organization engaged in work involving extended training and considerable experience on the part of the employees."

capricious and contrary to law (*supra*, p. 8). Both courts below found that (R. 44, 53):

> extraordinary measures were pursued to insure the protection and security of plaintiff's rights. To state that the claim was given most exhaustive treatment is hardly descriptive of the steps taken to guarantee a full, fair and sympathetic consideration of every aspect of his case.

Petitioner seeks to attack these findings on the ground that it constituted error to decide contested issues of fact on motion for summary judgment. A careful reading of the complicated complaint, however, fails to disclose a single factual allegation to support the charges of capriciousness, arbitrariness and illegality, which, as is well established, are nothing but legal conclusions. *Silberschein* v. *United States*, 266 U.S. 221, 225. Reduced to its essence, the complaint merely charges an erroneous application of Section 8 by the respondents. But mandamus is not a substitute for the writ of error. *Wilbur* v. *United States*, 281 U.S. 206, 220; *Adams* v. *Nagle*, 303 U.S. 532, 543; and see *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 695.

2. Brief mention may be made of the other contentions set forth in the petition.

a. The first question raised by the petitioner and the supporting argument (Pet. 3, 13-18) are not

altogether clear. They probably are confined to a discussion of the scope of jurisdiction in mandamus cases. There is, however, some indication that petitioner seeks to make an additional argument to the effect that by the very grant of veteran reemployment rights to federal employees Congress waived the sovereign immunity of the United States so that these rights might be enforced under judicial supervision (cf. Pet. 15).[6]

The court below properly rejected this contention, following the interpretation of Section 8 in *Insular Police Commission* v. *Lopez*, 160 F. 2d 673 (C.A. 1), certiorari denied, 331 U.S. 855. The very fact that Congress expressly provided for a judicial remedy for veterans in private employment (Section 8(a)), but failed to make analogous provisions for government employees, indicates that it envisaged the enforcement of these reemployment rights solely through administrative remedies. The circumstance that a statute creates a right against the United States does not mean that Congress intends that it be judicially enforced. *Lynch* v. *United States*, 292 U.S. 571, 582; *Tutun* v. *United States*, 270 U.S. 568, 576; *United States* v. *Babcock*, 250 U.S. 328. The waiver of statutory immunity requires a *specific* consent (*Nassau Smelting and Refining Works* v. *United States*, 266 U.S. 101, 106; *United States* v. *Shaw*, 309 U.S.

[6] The Administrative Procedure Act is inapplicable by its own terms. Sec. 2(a), 60 Stat. 237, 5 U.S.C. 1001(a).

495, 503), and this requirement of specificity and directness becomes even more essential in the field of federal personnel administration. *Keim* v. *United States,* 177 U.S. 290, 296; *Eberlein* v. *United States,* 257 U.S. 82.

b. Petitioner also claims that his reinstatement at allegedly too low a grade not only violated Section 8, but also constituted in effect a reduction in rank or compensation within the meaning of Section 14 of the Veterans' Preference Act of 1944 (58 Stat. 387, 390, 5 U.S.C. 863) and that there had been no compliance with the procedural requirements of Section 14. The courts below properly held that the Veterans' Preference Act is not applicable to petitioner's claim (R. 45, 53).

The Veterans' Preference Act of 1944 seeks to protect the veteran from a "reduction in rank or compensation." We submit that the reinstatement of a returned veteran at a rank or compensation not lower than the one he held at the time he entered the military service does not constitute a reduction in rank or compensation within the purview of the Veterans' Preference Act, even if it might have been erroneous.

Moreover, petitioner seeks to apply the Veterans' Preference Act as a sanction of the reemployment benefits under Section 8 of the Selective Service Act, so that a determination under the latter Act could be attacked as a violation of the former. In *Hilton* v. *Sullivan,* 334 U.S. 323, this

Court had to contend with the baffling complexities arising from an analogous attempt to construe the Veterans' Preference Act as affecting the reemployment benefits under Section 8. This Court held there that the 1944 Act did not interfere with the rights created by the 1940 Act. We submit that the result should be the same in the instant case.[7]

Finally, reference is made to the argument in our Brief in Opposition in the companion case, No. 146, October Term, 1952, p. 11, to the effect that petitioner as an employee of the legislative branch of the Government may not be entitled to the benefits of the Veterans' Preference Act.

c. The petition finally raises two procedural questions, whether the courts below erred in holding that the $3,000 jurisdictional amount applied to an original action in the nature of mandamus and whether under Rule 29 of the Local Civil Rules of the United States District Court for the District of Columbia the motion for summary judgment first should have been referred to the Commissioner of Veterans' Cases.

(i) The courts below properly held that they lacked jurisdiction to entertain the complaint since the administrative action sought to be reviewed involved the exercise of discretion and judgment. In those circumstances there is no need to reach the

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[7] This also disposes of petitioner's complaint of the violation of his rights under Section 12 of the Veterans' Preference Act, 58 Stat. 390, 5 U.S.C. 861.

question whether the complaint was also defective for lack of the jurisdictional amount.

(ii) We submit that the alleged violation of a local court rule does not usually call for the exercise of the supervisory powers of this Court, especially where there has been no showing of discrimination or resulting prejudice. Moreover, since it is the function of a motion for summary judgment to determine whether there are any genuine issues of fact, a reference prior to a decision on that motion would have caused needless work and duplication. It might even have constituted a violation of Rule 53(b), Federal Rules of Civil Procedure, directing that a reference shall be the exception and not the rule, and prohibiting in particular the general reference of specific types of cases. *Los Angeles Brush Corp.* v. *James,* 272 U.S. 701; *United States* v. *Kirkpatrick,* 186 F. 2d 393, 397-398 (C.A. 3).

CONCLUSION

The decision below is correct and does not warrant further review. It is respectfully submitted, therefore, that the petition for a writ of certiorari be denied.

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JULY, 1952

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